IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 453

JOHN McMILLAN GREGG,
Petitioner

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

INDEX

Washington, D. C. · THIEL PRESS · 202 · 393-0625

IN THE
UNITED STATES DISTRICT COURT
Western District of Kentucky
at Louisville

THE UNITED STATES

v.

Criminal Docket
No. 26745

JOHN McMILLAN GREGG
ROBERT JOSEPH SATTERFIELD

18 USC 2114
ARMED ASSAULT OF POSTAL EMPLOYEES
1 Count

* * *

RELEVANT DOCKET ENTRIES

Sept. 26, 1966 – Indictment returned and filed.

Oct. 6, 1966 – Order signed by Judge Gordon 10/4/66: This case continued until further orders.

March 22, 1967 – Order signed by Judge Gordon 3/20/67 that case is passed until April 10, 1967 at 9:30 A.M.

April 11, 1967 – Order (Arraignment) signed by Judge Brooks 4/11/67 that psychiatric report of the Medical Center in Springfield, Mo. was filed in open court. Deft's motion for a competency hearing subsequent to examination by a private psychiatrist is denied and case is set for jury trial 5/23/67.

April 10, 1967 – Psychiatric report filed in open court.

April 18, 1967 – Gregg Motion for Bill of Particulars; Motion to Dismiss Indictment of Defendant, John McMillan Gregg, and Objections to the Array of the Grand Jury; Motion to Inspect the Minutes of the Grand Jury; Motion of Defendant, John McMillan Gregg, Under Rule 16 for Discovery and Inspection; Brief in Support of Motion for Disclosure of Matters Occurring Before the Grand Jury,

Including Evidence Presented by United States of America; Brief in Support of Motion of Defendant, John McMillan Gregg, Under Rule 17 To Produce - filed by Dean E. Richards, Atty. for Defendant, Gregg.

April 20, 1967 - Gregg Entry of Appearance of Louis J. Hollenbach, III as associate Local Counsel for defendant, Gregg filed.

April 26, 1967 - Motion for Extension of Time in which to file Response to def's Gregg Mos. for Bill of Particulars, To Dismiss Indictment, To Inspect Minutes of Grand Jury, for Discovery and Inspection, Brief in Support of Mo. to Produce and Brief in Support of Mot. for Disclosure, etc. - filed by U.S. Atty.

April 28, 1967 - Order signed by Judge Brooks 4/28/67: Motion to dismiss indictment and objections to array of Grand Jury denied and overruled, respectively; Motion for discovery under R. 16, F. R. Cr. P. sustained, only to the extent permitted by R. 16 and not otherwise. Time, place and manner of making discovery and inspection as permitted by Rule, if it cannot be agreed upon by the parties, shall take place in the office of the U.S. Atty. at Louisville on Mon. May 8, 1967, at 9:30 a.m. Copies to Messrs. Huddleston and Richards April 28, 1967.

May 5, 1967 - Letter from U.S. Attorney transmitting copy of letter from U.S. Attorney to Dean E. Richards, attorney for defendant Gregg, disclosing certain information requested by counsel for defendant.

May 11, 1967 - Praecipe for subpoena for W. M. Kelly, Finance Examiner, Post Office, received; spoe. issued and delivered to U.S. Marshal.

May 11, 1967 - Praecipe for spoes. as to L. P. Oliver, J. R. Dibowski, W. L. Sumner, Jr., Fontaine Rodman, Mrs. Effie Smith, Mrs. Grace Smith, Tommy E. Cauthen, Warren P. Delp, Sgt. A. L. Price, Frank J. Anderson, and Michael W. Stuart - filed by U.S. Spoes. issued and delivered to Marshal 5/11/67.

May 15, 1967 - Defendant's Motion for Continuance and notice of hearing thereon on May 19, 1967, filed; proposed order tendered.

May 16, 1967 - Spoe. as to W. M. Kelly returned executed.

May 16, 1967 - Spoes. as to Mrs. Grace Smith and Mrs. Effie Smith returned executed.

May 17, 1967 - Spoe. as to Fontaine Rodman returned executed.

May 22, 1967 - Order signed by Judge Brooks continuing this case until May 31, 1967, at 9:30 a.m. Copies to Messrs. Rivers, Richards and Hollenbach 5/22/67.

May 22, 1967 - Praecipe for spoes. as to L. P. Oliver, J. R. Dobowski, W. L. Sumner, Jr., Fontaine Rodman, Mrs. Effie Smith, Mrs. Grace Smith, Tommy E. Cauthen, Warren P. Delp, Sgt. A. L. Price, Frank J. Anderson, Michael W. Stuart and W. M. Kelley. Spoes. issued and delivered to Marshal 5/22/67.

Spoes. (of 5/22) as to W. L. Sumner, Jr., Mrs. Effie Smith, L. P. Oliver, Mrs. Grace Smith, Frank J. Anderson, Sgt. A. L. Price, Tommy E. Cauthen, Michael W. Stuart.

May 23, 1967 - Spoe. as to Fontaine Rodman returned executed.

May 24, 1967 - Spoe. as to W. M. Kelley and W. L. Sumner (5/10) returned executed.

May 25, 1967 - Spoes. as to Warren Delp (2), Michael Stuart, Frank J. Anderson, L. P. Oliver ret'd executed.

May 26, 1967 - Spoe. as to J. R. Dibowski returned executed.

May 31, 1967 - Motion to Suppress Evidence and Motion to Dismiss Indictment filed by Dean E. Richards and Louis J. Hollenbach, III.

May 31, 1967 - Motion for Directed Verdict (Judgment of Acquittal) filed by atty. Richards in open court.

May 31, 1967 – Verdict filed, returned in open court, and read by the foreman as follows:

"We, the Jury, find the defendant, John McMillan Gregg, Guilty as to Count One of the indictment.

May 31, 1967 (Date) — Mrs. A. C. Dearing, Jr. (Foreman)

June 1, 1967 – Judgment and Commitment entered by Judge Gordon reflecting above jury verdict of guilty, and sentence imposed by Court of 25 years on count one of the indictment. Cys. sent to Probation Office, U.S. Marshal, and U.S. Atty.

June 1, 1967 – Trial Order entered by Judge Brooks, reflecting above verdict; cys. sent to U.S. Atty., Mr. Richards and Mr. Hollenbach.

June 1, 1967 – Spoes. returned executed as to Sgt. A. L. Price & Tommy Cauthen.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

ORDER

This case was called in open court on April 10, 1967, and there appeared Phillip Huddleston, Assistant United States Attorney, and the defendant, John McMillan Gregg, in person and by his counsel, Dean E. Richards, Indianapolis, Indiana.

Defendant's identity was acknowledged and he was furnished a copy of the indictment and advised of the nature of the charges against him. Formality of arraignment was waived and a plea of NOT GUILTY was entered as to the one count of the indictment.

The psychiatric report of the Medical Center for Federal Prisoners at Springfield, Missouri, was filed in open court. Defendant's motion for a competency hearing subsequent to examination by a private psychiatrist is denied, and this

case is set for trial before a jury on May 23, 1967, at 9:30 a.m.

Dated: April 11, 1967.

/s/ Henry Brooks
United States District Judge

TRANSCRIPT OF THE PROCEEDINGS

VERDICT OF THE JURY AND SENTENCING BY THE COURT

BY THE COURT: Ladies and gentlemen, have you arrived at a verdict in this case?

FOREMAN OF THE JURY: Yes, Your Honor.

BY THE COURT: Mrs. Dearing, will you read the verdict of the jury?

FOREMAN OF THE JURY: We, the Jury, find the defendant, John McMillan Gregg, guilty to count one of the indictment.

BY THE COURT: I'll ask each individual juror if that's your verdict?

(WHEREUPON, ALL JURORS INDICATE AFFIRMATIVELY.)

BY THE COURT: Members of the jury, I have lost my note as to when you should come back. Will you check it and will you just resume your seats in the courtroom.

Now, wait just one minute, ladies and gentlemen. Will counsel acknowledge that all members of the jury are in the courtroom and were at the time that the verdict was read and that each of them individually was polled?

MR. RICHARDS: Yes, Your Honor.

MR. HUDDLESTON: Yes, Your Honor.

BY THE COURT: Well, thank you very much. Each of you resume your seats in the courtroom. Let the defendant come forward.

(WHEREUPON, THE DEFENDANT AND HIS COUNSEL STAND BEFORE THE COURT.)

BY THE COURT: This defendant has been found guilty by a jury. Does the United States have a recommendation?

MR. HUDDLESTON: Your Honor, there is a mandatory 25 year imprisonment.

BY THE COURT: Yes. And the only way that verdict can be changed in any way would be by probation, and in no other way can it be varied. It's compulsory under the law that a defendant found guilty of this charge, as this defendant has been found guilty, must receive a 25-year penalty.

Now, does the defendant or his counsel have anything that they wish to say before sentence is imposed?

MR. RICHARDS: Yes, Your Honor, I would like to ask the mercy of the Court. John McMillan Gregg has been found guilty of this charge against him today. John Gregg is married, his wife is pregnant, he's got a tremendous—he's got a great number of years to serve in the Federal penitentiary on the crime that he has just now been found guilty of.

We would like, and ask the mercy of the Court, that Mr. Gregg be released upon the bond that he has and until he reports to where the—to the Marshal's office to start serving his sentence Monday of this week, at least go home, make arrangements, tell the wife and kids, his wife goodbye, to get her set up. And I don't feel that he has—he has shown that he will appear in this court at any time. He's got another bond against him. He's not about to run. He has no record of running. He'll be here, and we ask the Court's mercy of giving this man three or four days before he starts serving the years and years that he has facing him in prison, to go home and spend a few days with his wife. I don't feel that this is such a great burden upon the Court to let Mr. Gregg do this.

BY THE COURT: Gregg, do you have anything you wish to say to the Court?

MR. GREGG: Yes, Your Honor. If I can go home just to get my wife straightened out and get all my—get all my bills taken care of. I'm not going to run. I never have before, and I'm not going to start now.

BY THE COURT: Well, you've known for almost a year now what was going to happen, and you should have prepared for it and not waited until the last minute.

MR. RICHARDS: Your Honor, I would like to ask that a pre-sentence investigation be made of—

BY THE COURT: (Interrupting) A pre-sentence investigation has been made. It is before me now, and I have read it. It shows a juvenile record. It shows in 1960 this defendant stole an automobile in violation of the Dyer Act and was given an indeterminate youth commitment sentence. He was paroled in 1965. He was returned—no, he was paroled in '62, returned as a parole violator in '65 and was not released full time until May of last year.

I am also informed that he was convicted of armed robbery in Yuma, Arizona, and given from seven to ten years. Several warrants are now pending against him for robbery with which he is charged.

It will be the judgment of this Court that this defendant be sentenced to the mandatory 25 years. Custody of the Marshal.

* * *

No. 18,150

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed June 18, 1968]

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

JOHN McMILLAN GREGG
Defendant-Appellant

ORDER

Before WEICK, Chief Judge, PHILLIPS and EDWARDS, Circuit Judges.

Appellant has no standing to question the search of a closet in an unrented room of a motel where he was hiding when he was arrested. In our judgment, the officers had probable cause to make the arrest and the search was incident thereto.

Nor do we find any prejudicial error in the conduct of the trial or in the Court's instructions to the jury. Venue was proven.

There is no basis for inferring prejudice from the facts that the District Judge had seen the pre-sentence investigation report prior to the time when the jury returned its verdict and that the District Judge sentenced defendant immediately thereafter. *Calland v. United States*, 371 F.2d 295 (7th Cir. 1966) *cert. denied*, 388 U.S. 916.

The judgment of conviction is affirmed.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

[Filed July 8, 1968]

PETITION FOR REHEARING OR REHEARING IN BANC

TO THE HONORABLE PAUL C. WEICK, CHIEF JUDGE, AND THE HONORABLE HARRY PHILLIPS AND GEORGE EDWARDS, CIRCUIT JUDGES:

This is a petition of, by and for John McMillan Gregg to order a rehearing or a rehearing in banc of the appeal from a judgment of conviction in the United States District Court for the Western District of Kentucky, entered on May 31, 1967, the same day that petitioner's trial by jury began and concluded, adjudging petitioner guilty of placing lives in jeopardy in perpetrating a postal contract station robbery and sentencing him to imprisonment for a term of twenty-five years. The said judgment was affirmed by this Court on June 18, 1968, by the entry of an order without opinion.

* * *

[Filed July 26, 1968]

ORDER

Before WEICK, Chief Judge, PHILLIPS and EDWARDS, Circuit Judges.

Upon consideration of the petition for rehearing it is ordered that said petition be and it is hereby denied. We decline to consider a claimed error in District Judge's instructions to the jury which was not raised in the District Court, or in this Court, when the appeal was heard and decided. Rules 30 and 52, Fed.R.Crim.P.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

Supreme Court of the United States

No. 453 —, October Term, 1968

John McMillan Gregg,

Petitioner,

v.

United States

ORDER ALLOWING CERTIORARI. Filed November 12, 1968

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, limited to the questions raised in the case with respect to Rule 32 (c)(1) of the Federal Rules of Criminal Procedure and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

PETITION FOR A WRIT OF CERTIORARI

No. 453

In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1968

JOHN McMILLAN GREGG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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AUTHORITIES CITED

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1968

No.

JOHN McMILLAN GREGG

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Sixth Circuit which affirmed the Judgment of the United States District Court for the Western District of Kentucky finding Petitioner guilty of the crime of assault upon persons having lawful custody of a postal contract station with intent to rob them of money or property in their possession by putting the lives of said persons in jeopardy, in violation of Title 18, United States Code, Section 2114a and sentencing him to a term of twenty five years in the penitentiary

which term the Petitioner presently is serving in a federal prison.

THE OPINION BELOW

The United States Court of Appeals for the Sixth Circuit decided this case without a printed opinion. The Court's order deciding this case is set forth in Appendix A hereto. A Petition For Rehearing was timely filed and the same was denied on July 30, 1968.

STATEMENT OF JURISDICTION

The decision and judgment of the United States Court of Appeals for the Sixth Circuit without printed opinion was entered on June 18, 1968. A petition for rehearing was then filed within the time allowed by the rules of the said lower court and the same was denied on July 30, 1968.

The statutory provision believed to confer upon this Court, jurisdiction to review the judgment in question by Writ of Certiorari is Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether a convicted defendant is entitled to a new trial where the presiding judge has head his pre-sentence report prior to the end of his trial contrary to the express provisions of Rule 32(c)(1) of the Federal Rules of Criminal Procedure and there is nothing in the record to rebut any presumption of prejudice. To this question the Seventh Circuit has answered "yes" in *Calland* v. *United States*, 371 F.2d 295, 296 (1966) while the Sixth Circuit has answered "no" where the issue was presented in Petitioner's cause.

2. Whether it constitutes a deprivation of due process of law and a prejudicial violation of Rule 30 of the Federal Rules of Criminal Procedure for a trial court to submit a criminal defendant's cause to the jury upon a charge which does not state the elements of the offense, regardless of whether such instructions are specifically requested by the defense, particularly where the opportunity to make a tender is not fairly given and the defense is asked in the presence and hearing of the jury if it has any objections to the court's charge. To this question the Fifth Circuit has answered "yes" in *Merrill* v. *United States,* 338 F.2d 763, 767 (5th Cir. 1964) and the D.C. Circuit has answered "yes" in *Byrd* v. *United States,* 342 F.2d 939, 940, 941 (D.C. Cir 1966) and the Fourth Circuit has answered "yes" in *United States* v. *Harris,* 346 F.2d 182, 184 (4th Cir. 1965) while the Sixth Circuit has answered "no" where the issue was presented in Petitioner's cause.

STATUTES AND USAGES INVOLVED

> The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.
>
> *Federal Rules of Criminal Procedure, Rule* 32(c)(1)

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests

prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Federal Rules of Criminal Procedure, Rule 30

STATEMENT OF THE CASE

Petitioner was indicted by the Grand Jury for the Western District of Kentucky for the crime of placing lives in jeopardy in robbing a postal substation and on May 31, 1967 his trial before a jury was initiated and completed and the case went to disposition that same day. At the close of all the evidence the trial court announced to the jury that final arguments would proceed immediately whereupon defense counsel protested that he had not anticipated such abruptness in the proceedings and the defense was awarded a five minute recess to prepare its final argument. Final arguments were then heard whereupon the trial court immediately delivered a 519 word charge to the jury which was as follows:

> Members of the jury, it is—you are the sole judges of the facts of this case, and you will take the facts as you find them to be and apply to those facts the law as I give it to you in this charge. Now the defendant in this case has been indicted by the grand jury and charged with the unlawful acts concerning which you've heard the evidence in this case. But the mere fact that this defendant has been indicted by the grand jury is not evidence of his guilt. An indictment is only a charge and guilt must be established by competent evidence to the exclusion of a reasonable doubt.

And the burden rests upon the United States to establish the guilt of this defendant beyond a reasonable doubt, and that burden never shifts but remains with the Government throughout the trial. And throughout the trial this defendant is surrounded with a presumption of innocence, and that presumption of innocence is evidence in his behalf and it remains with him throughout the trial and until such time as it may be removed, again by evidence which you believe to the exclusion of a reasonable doubt. What is a reasonable doubt? A reasonable doubt is a doubt based upon reason. It is not a mere misgiving or a vague, fanciful or possible doubt. Everything, as you ladies and gentlemen know, susceptible of human testimony is probably conducive of some doubt. It does mean a doubt based upon a substantial foundation as would prevent reasonable men and women after carefully considering all of the evidence or lack of evidence from having an abiding conviction to a moral certainty of the proof of the charge and the guilt of the accused. If the jury has a reasonable doubt of the guilt of this defendant, he is entitled to an acquittal. But if after considering all of the evidence or lack of evidence and giving the accused the benefit of a reasonable doubt you are led to the conclusion that the defendant is guilty as charged, you shall so say by your verdict. Now, you are familiar with the terms of this indictment. It is charged that on or about the 11th day of July at Louisville, that the defendant made an assault on Mrs. Effie R. Smith and Mrs. Grace Smith, persons having legal charge, control and custody of the United States Post Office here at 1612 Bardstown Road with intent to rob, steal and purloin mail matters, money and custody of the said Mrs. Smith, and in attempting to effect such robbery John McMillan Gregg put the life of Mrs. Effie R. Smith and Mrs. Grace Smith in jeopardy by the use of a dangerous weapon, a hand-held firearm, the exact description of which being to the grand jurors unknown. Now, ladies and gentlemen, if you believe from the evidence that this

defendant is guilty beyond a reasonable doubt of this charge, you shall so say by your verdict. If you do not so believe, you shall acquit him.

The trial court then asked in the presence and hearing of the jury if there were any objections to the charge and government counsel immediately replied in the presence and hearing of the jury that the government had none and then defense counsel stated that he had not been privy to the Court's intended instructions prior to the charge and that he did have written instructions to tender. The Court had counsel approach the bench and, after looking over the written, tendered instructions, the Court stated to the jury that it should not consider the fact that the Petitioner had not testified and that there was a prepared verdict form and that the Marshal should conduct the jury to the jury room. Immediately after the jury returned with its verdict the Court proceeded to disposition without recess or without any pause which would have permitted the Court to read or study anything subsequent to the return of the verdict. After a brief colloquy at the bench, defense counsel requested that a pre-sentence investigation be conducted.

Mr. Richards: Your Honor, I would like to ask that a pre-sentence investigation be made of—

By The Court: (Interrupting) A pre-sentence investigation has been made. It is before me now and I have read it.

The trial court then recited the petitioner's past conflicts with the law as reflected in the pre-sentence report and without hearing further from the defendant or the defense, sentenced the petitioner to twenty-five years imprisonment.

REASONS FOR GRANTING THE WRIT

1. The record before the Sixth Circuit presented an undeniable violation of the express provisions of Rule 32(c)(1) of the Federal Rules of Criminal Procedure as the trial court went from receiving the jury's verdict to the passing of judgment without pause. From this the only conclusion that can be drawn is that the pre-sentence report was prepared prior to the Petitioner's trial which began and ended the same day and it was presented to and read by the trial court prior to the end of petitioner's trial contrary to the ex-provisions of the aforesaid rule of criminal procedure. The only question that remains is that of whether Rule 32(c)(1) is merely advisory or mandatory.

In *Calland* v. *United States,* 371 F.2d 295, 296 (1966) the Seventh Circuit held that the provisions of the said rule were to be considered mandatory and that a violation of the said rule should create a presumption of prejudice requiring reversal of any judgment based upon a trial which was completed subsequently to such a violation unless "the facts in the record before us effectually rebut the presumption of prejudice arising from the apparent violation of Rule 32(c)(1)." In the present case, the Sixth Circuit, while citing the *Calland* case, has held that a conviction and judgment under such a set of circumstances must be affirmed where "There is no basis for inferring prejudice from the facts that the District Judge had seen the pre-sentence investigation report prior to the time when the jury returned its verdict and that the District Judge sentenced defendant immediately thereafter."

It is submitted that the conflict between the conflict between the Sixth and Seventh Circuits is obvious on this point and it is further submitted that the fact that the said conflict involves a mere question of burden of proof

on appeal does not render this issue a mere technical issue. The question of burden of proof on appeal does, as a practical matter, resolve the question of whether the Federal Rules of Criminal Procedure and, more particularly, the above-cited rule is to be deemed advisory and not mandatory. If the Federal Rules of Criminal Procedure and Rule 32(c)(1) is to be considered mandatory and enforceable other than by its own inherent force of persuasion, it necessarily follows that where a trial-judge has perused the pre-sentence report prior to the conviction of a presumably innocent accused, such a premature perusal must require a reversal. The Sixth Circuit's holding that prejudice must be established in addition to the violation amounts to making the rule unenforceable. No criminal appellant or appeals court is in a position to read the mind of the trial judge in order to establish prejudice.

It further is submitted that there is manifest injustice in any judicial system which permits, condones or encourages the conducting of pre-sentence investigations prior to conviction without the consent of the accused. Where such an investigation which requires interviews of all friends and contacts of an accused is conducted, any innocent accused who subsequently is found not guilty necessarily suffers irreparable harm.

It is the Petitioner's position that the foregoing presentation demonstrates that not only does the question herein involve a conflict between circuits, it also involves a question of manifest social importance and a further question as to whether the supervisory powers of this Court should be invoked for the purpose of eliminating the practice of conducting pre-sentence investigations prior to conviction without the consent of the accused.

2. It likewise cannot be disputed that the charge given the jury in the trial of this cause did not include any recitation of the elements of the offense for which the Petitioner was being tried. There was a narrative recitation of the language of the indictment but all of the decisions cited hereinafter have found such recitations to be inadequate.

In *Merrill v. United States*, infra, *Byrd* v. *United States* infra, and *United States* v. *Harris*, infra, the Fifth, District of Columbia and Fourth circuits have held that it is plain error (even when invited) to give a charge without such an explanation of the elements of the offense as to make clear to a jury all of the facts which it must find beyond reasonable doubt before it may return a conviction.

> Although his counsel's argument was playing fast and loose with the court and jury—a practice we condemn—we cannot agree that his argument was in law a voluntary and understanding plea of guilty by the defendant, relieving the trial court of its duty to instruct the jury under Rule 30 F.R.Cr.P. on all of the essential elements of the offense charged, with an instruction on the presumption of innocence.
>
> *Merrill* v. *United States*, 338 F.2d 763, 767 (5th Cir. 1964)

> We hold, therefore, that the trial judge's omission to instruct the jury on every essential element of the crime was plain error under Rule 52(b) Fed. Rule Crim. P. By this omission, appellant's substantial right to have the jury pass on every essential element of the crime was prejudicially effected and a new trial is required.
>
> *Byrd* v. *United States*, 342 F.2d 939, 940, 941 (D.C. Cir. 1966)

> If Harris is reindicted and re-tried for a violation of Sec 2113(c), the submission should outline to the

jury the elements of the crime. That was not done here. The omission was not supplied by the reading of the statute to the jury. In every criminal prosecution, we have heretofore insisted, an exposition of the constituents of the offense is mandatory and indispensable. *Screws* v. *United States*, 325 U.S. 91, 106-107, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945); *United States* v. *Hutchison*, 338 F.2d 991 (4th Cir. 1964).

United States v. *Harris*, 346 F.2d 182, 184 (4th Cir. 1965)

These decisions by the said circuits have been based upon this Court's decision in *Screws* v. *United States*, 325 U.S. 91, 106-107, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) which latter decision did not go into the subject of whether errors of the sort which led to the said decision and reversal must be preserved by some formal act of defense counsel at the trial before they may be considered.

In its written order in this cause the Sixth Circuit disposed of the foregoing matter with the following summary statement: "Nor de we find any prejudicial error in the conduct of the trial or in the Court's instructions to the jury." (See Appendix A) It is urged that prejudice must be presumed where the trial court makes no attempt to outline the elements of the offense in delivering its charge to the jury in a criminal case and that the absence of tendered instructions on the point should be of no significance, especially under such circumstances as those heretofore outlined in Petitioner's Statement of the Case.

It also is urged that the scant charge of the trial court delivered after a reading of the Petitioner's pre-sentence report coupled with the abruptness with which the trial was brought to a conclusion constituted such a serious departure from the accepted and usual course of judicial proceedings that its sanctioning by the Sixth Circuit calls upon this Court to exercise its power of supervision.

CONCLUSION

It is urged that there is such conflict among the circuits as to require this Court's attention in the matter of the trial court's premature reading of the Petitioner's pre-sentence report contrary to the provisions of Rule 32(c)(1) of the Federal Rules of Criminal Procedure and in the matter of the trial court's charge failing to advise the jury as to the essential elements of the subject offense and that the latter question has been resolved by the Sixth Circuit in a way probably in conflict with an applicable decision of this Court, i.e., *Screws* v. *United States,* supra, and that both matters taken together constituted a grave departure from the accepted and usual course of judicial proceedings and call upon this Court to exercise its power of supervision, particularly with respect to the proper implementation of Rule 32(c)(1).

It is, therefore, respectfully submitted that Certiorari should be granted and that the decision of the United States Court of Appeals for the sixth Circuit should be reversed; or in the alternative, that this Court should vacate said judgment and remand this cause to the United States Court of Appeals for the Sixth Circuit for further proceedings not inconsistent with an appropriate opinion.

Respectfully submitted,

DEAN E. RICHARDS
Attorney for Petitioner

PALMER K. WARD
Of Counsel

APPENDIX A

Before Weick, Chief Judge, Phillips and Edwards, Circuit Judges.

Appellant has no standing to question the search of a closet in an unrented room of a motel where he was hiding when he was arrested. In our judgment, the officers had probable cause to make the arrest and the search was incident thereto.

Nor do we find any prejudicial error in the conduct of the trial or in the Court's instructions to the jury. Venue was proven.

There is no basis for inferring prejudice from the facts that the District Judge had seen the presentence investigation report prior to the time when the jury returned its verdict and that the District Judge sentenced defendant immediately thereafter. *Calland* v. *United States*, 371 F.2d 295 (7th Cir. 1966), *cert. denied*, 388 U.S. 916.

The judgment of conviction is affirmed.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 453

JOHN McMILLAN GREGG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on June 18, 1968. A petition for rehearing was denied on July 26, 1968. The petition for a writ of certiorari filed on August 28, 1968, is out of time under Rule 22-2 of the Rules of this Court. There is, in any event, no occasion for review by this Court.

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted under an indictment which charged

that he had robbed the custodians of a post office and put their lives in jeopardy by the use of a dangerous weapon, in violation of 18 U.S.C. 2114. On May 31, 1967, he was sentenced to imprisonment for twenty-five years, a mandatory sentence set by the statute.

The evidence showed that on July 11, 1966, at about 3:30 p.m., two men, armed with guns, robbed a contract station of the post office in Louisville, Kentucky of $488.60 and twenty-one blank money orders. One of the robbers, identified at the trial as petitioner, admonished one of the two women in the station "One false move out of you, I'll blow your brains out." (G.A. 22-30). One week later, petitioner was arrested for another crime at an Indianapolis motel. He was found hiding in a closet with a canvas bag containing eighteen of the postal money orders stolen from the postal station and a pistol (G.A. 73-76).

1. After the return of the verdict, the jury was polled. The court then called petitioner forward for sentencing and advised him that the statute provided for a mandatory twenty-five year sentence. Defense counsel requested a brief stay to permit petitioner a visit with his wife and family. When he then requested a pre-sentence investigation, the court replied: "A pre-sentence investigation has been made. It is before me now, and I have read it." The court then recited petitioner's past criminal violations as shown by the pre-sentence report and, following this, imposed sentence.

We should not lightly assume that the trial court considered the presentence report prior to the return of the guilty verdict, contrary to the requirements of

Rule 32(c)(1).[1] The court might have scanned the report while the jury was being polled and counsel was requesting a delay in the imposition of sentence. Moreover, if the trial judge did read the report in advance of the guilty finding, it was most probably while the jury was considering the question of guilt. As the Seventh Circuit held in *Calland* v. *United States*, 371 F.2d 295, certiorari denied, 388 U.S. 916, violation of the rule at this time could be no more than technical; where all the evidence had been concluded, and the fact of the defendant's guilt was obvious and apparent to all, a court may "reject the inference that [an] inadvertently premature examination of the probation report at the stage of the proceeding when the defendant had not yet been found guilty in any way contributed to or influenced that finding." 371 F.2d at 296. Indeed, even assuming that the trial judge might have read the report in advance of charging the jury, petitioner's counsel—who also represented him at trial—failed to object then and fails to suggest now how specific prejudice might have occurred. Any error here is far less serious than the *ex parte* interviews with government witnesses in advance of adjudication of guilt which occasioned the comment of Mr. Justice Clark in *Smith* v. *United States*, 360 U.S. 1, 17-18 (concurring opinion), and does not rise to the

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[1] Rule 32(c)(1) provides in pertinent part:

> "The [presentence] report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty."

The rule by implication anticipates that pre-sentence reports will be made in advance of verdict.

level of "plain error," Fed. R. Crim. P. 52(b). Thus, the question what remedy might be appropriate for a violation of the rule is not suitably presented.[2]

2. Petitioner's challenge to the jury charge in his case is inappropriate for review in this Court. In any event, it is without merit.

In its charge, the court read the substance of the indictment, stating: "It is charged that on or about the 11th day of July at Louisville that the defendant made an assault on Mrs. Effie R. Smith and Mrs. Grace Smith, persons having legal charge, control and custody of the United States Post Office here at 1612 Bardstown Road with intent to rob, steal and purloin mail matters, money and other property which were then in the charge, control and custody of the said Mrs. Smiths, and in attempting to effect such robbery John McMillan Gregg [petitioner] put the life of Mrs. Effie R. Smith and Mrs. Grace Smith in jeopardy by the use of a dangerous weapon, a hand-held firearm * * *.

"Now, ladies and gentlemen, if you believe from the evidence that this defendant is guilty beyond a reasonable doubt of this charge, you shall say so by your verdict. If you do not so believe, you shall acquit him." (G.A. 95-96) ("Reasonable doubt" had been previously defined). Petitioner's counsel then made objections and thirteen requests to charge, none of which related to his present complaint that the jury

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[2] At all events, there is no occasion to direct a new trial. Although we believe such a hearing is not warranted here, petitioner's claim, at most, suggests a remand to the district court for inquiry into the precise factual circumstances of the reading and the question of possible prejudice.

was not advised as to the elements of the offense. Accordingly, the present objection is foreclosed, Fed. R. Crim. P. 30. In any event, the charge informed the jury, with appropriate reference to the facts of the case, that they must determine (1) that the assaulted persons were custodians of a post office; (2) that the petitioner assaulted them with intent to steal mail matters; and (3) that, in attempting to effect such robbery, petitioner put their lives in jeopardy by use of a dangerous weapon. Thus, all required elements were touched on. Granted the general proposition for which the cases petitioner cites stand—that the charge must not leave jurors in ignorance or to conjecture as to what they must find—application of this proposition is basically a factual matter, depending upon the circumstances of each case. Such inquiry is appropriate to the courts of appeals, and was made in this case. In the absence of any constitutional or other special reason giving prominence to petitioner's claim, there is no occasion for further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

SEPTEMBER 1968.

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CASE AUTHORITIES

OTHER AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 453

JOHN McMILLAN GREGG, Petitioner

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

There were no reported opinions in the Sixth Circuit or in the District Court. The order filed in the Sixth Circuit upon the affirming of the Petitioner's conviction is quoted hereinafter in pertinent part and appears at (A. 8).

CONCISE STATEMENT OF GROUNDS UPON WHICH JURISDICTION IS INVOKED

In his Petition for Writ of Certiorari Petitioner asserted that this Court has jurisdiction under Title 28, United States Code, Section 1254(1) and that this Court should

exercise its supervisory powers. Certiorari was granted on November 8, 1968 and Petitioner was given until December 27, 1968 to file his brief on the merits.

REGULATION INVOLVED

> The probation service of the court shall make a pre-sentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.
>
> *Federal Rules of Criminal Procedure*, Rule 32(c)(1)

QUESTION PRESENTED

Whether a convicted defendant is entitled to a new trial where the presiding judge has read his pre-sentence report prior to the end of his trial contrary to the express provisions of Rule 32(c)(1) of the Federal Rules of Criminal Procedure and there is nothing in the record to rebut any presumption of prejudice. To this question the Seventh Circuit has answered "yes" in *Calland v. United States*, 371 F.2d 295, 296 (1966) while the Sixth Circuit has answered "no" where the issue was presented in Petitioner's cause.

CONCISE STATEMENT OF CASE

On May 31, 1967 Petitioner was tried before a jury in the United States District Court for the Eastern District of Kentucky for the offense of placing lives in jeopardy in robbing a postal substation and immediately after the jury returned its verdict of conviction the Court proceeded to disposition without any recess or pause. As the Court was about to impose sentence, defense counsel requested that a pre-sentence investigation be conducted.

> Mr. Richards: Your Honor, I would like to ask that a pre-sentence investigation be made of

> By the Court: (Interrupting) A pre-sentence investigation has been made. It is before me now and I have read it. (A. 7)

The trial court then recited the Petitioner's past conflicts with the law as reflected in the pre-sentence report and without hearing further from the defendant or the defense, sentenced the petitioner to twenty-five years imprisonment.

ARGUMENT

BRIEF SUMMARY

In the pertinent part of his Petition for Certiorari the Petitioner urged that there was a conflict between the Seventh Circuit and the Sixth Circuit on the question of whether prejudice or non-prejudice is to be presumed on appeal where it appears that a judge has read a pre-sentence report before conviction or plea. The petitioner further urged that this Court should exercise its supervisory powers to prohibit all pre-sentence investigations prior to conviction or plea in the absence of an intelligent consent thereto by the defendant because such investigations work substantial damage upon the reputation of an accused who might subsequently be acquitted and because investigations conducted under such circumstances can do substantial and unjust harm to a guilty accused at his sentencing. This Court granted certiorari limited to the "questions" plural raised in the case with respect to Rule 32(c)(1) of the Federal Rules of Criminal Procedure. Accordingly this argument is in three parts which can be summarized as follows:

1. In its order affirming the Petitioner's conviction the Sixth Circuit invoked, without quoting, the authority of *Calland v. United States*, 371 F.2d 295 (7th Cir. 1966), *cert. denied*, 388 U.S. 916 in holding that the burden of proof was on the appellant therein and Petitioner herein to show that prejudice resulted from the trial court's reading of his pre-sentence report prior to conviction. On Petition for Rehearing the Petitioner demonstrated that the *Calland* holding was that the burden was on the appellee to show

non-prejudice in such instances and that Calland's conviction was affirmed only because that burden had been met. In spite of this presentation a rehearing was not granted. It is urged herein that this conflict between the circuits should be resolved in favor of the Seventh Circuit's position because it would be impossible for an appellant to make an affirmative showing of prejudice under the circumstances herein (and under almost all circumstances) because such a showing could be made only through a demeaning interrogation of the trial court which a convicted defendant would have no right to undertake. Placing the burden on the appellant where Rule 32(c)(1) is violated would emasculate the rule.

2. The literature in the field of federal probation investigation establishes conclusively that the most important part of a properly conducted pre-sentence investigation is the interview of the subject and the attitutde expressed by him. Judges at judicial conferences which have been reported in the Federal Rules Decisions have confirmed the importance of this phase of the investigation to the determining of the sentence to be meted out. Where there is no consent to a pre-conviction pre-sentence investigation there necessarily is no interview of the accused and the investigation necessarily is an incompetent one. Where an investigation is conducted without an intelligent consent by an accused before the accused has been subject to the therapeutic effect of an extensive conference with his counsel, proceedings in court and the passage of time after his arrest, he is likely to demonstrate such belligerence or such a propensity to rationalize in the course of his interview as to cause him great harm at the time of sentencing because of mistaken comparisons which will be made between him and similar defendants whose pre-sentence investigations are conducted under proper conditions. It is urged herein that this Court should exercise its supervisory powers to require that pre-sentence investigations not be submitted to or considered by a sentencing court where conducted prior to conviction without consent of counsel as well as the accused.

3. The literature in the field of federal probation investigation further establishes that pre-sentence investigations necessarily must include interviews of the past and present social, religious, educational and employment contacts of the defendant. Where such an inquiry is launched prematurely and without consent great damage will be done to an accused who might ultimately be found innocent and who is presumably innocent at the time of such inquiry.

* * *

The relief being prayed for is that of a new trial with instructions that if Petitioner be convicted at his new trial any pre-sentence report submitted is to be based only upon information obtained independently of Petitioner's old pre-sentence report in an investigation conducted subsequent to such conviction.

I

Prejudice Should Be Presumed Where It Appears That the Express Provisions of Rule 32(c)(1) Have Been Violated Because To Do Otherwise Would Emasculate the Rule

The order by the Sixth Circuit affirming Petitioner's conviction reads as follows in pertinent part:

> There is no basis for inferring prejudice from the fact that the District Judge had seen the pre-sentence investigation report prior to the time when the jury returned its verdict and that the District Judge sentenced defendant immediately thereafter. *Calland v. United States*, 371 F.2d 295 (7th Cir. 1966), *cert. denied*, 388 U.S. 916. (A. 8)

The above-quoted ruling cannot be construed as anything but a holding that the absence of prejudice will be presumed on appeal where it merely appears that the trial judge read the pre-sentence report prior to conviction with no further showing. The Seventh Circuit ruled directly to the contrary in the *Calland* case which the Sixth Circuit cited:

> We hold that the facts in the record before us effectually rebut the presumption of prejudice arising from the apparent violation of Rule 32(c)(1).
>
> *Calland v. United States*, 371 F.2d 295, 296 (7th Cir. 1966)

Justice Clark, late of this Court, also took the position that such a violation creates a presumption of prejudice. On a set of different but not distinguishing facts he ruled as follows in a concurring opinion to a reversal which was rendered by the majority on other grounds:

> In a criminal case, such a private conference must be deemed presumptively prejudicial where, in violation of Fed. Rules Crim. Proc. 32(c)(1) it was conducted prior to the plea. For these reasons I would reverse the judgment with instructions that Smith be allowed to withdraw his guilty plea and stand trial on the information.
>
> *Smith v. United States*, 360 U.S. 1, 11, 18, 79 S.Ct. 991, 3 L.Ed.2d 1041 (1959)

If the position taken by the Seventh Circuit and by Justice Clark is upheld by this Court the Petitioner's conviction necessarily must be reversed.

The Petitioner was convicted in an area of the country where the District Court criminal dockets are heavily laden with bootleg cases and this circumstance has caused the Judges of these courts to develop a strong distaste for the requirements of Rule 32(c)(1) as was expressed at one reported judicial conference.

> Some of the participating judges would go further and would repeal that portion of Rule 32(c) that prohibits the judge from reading the pre-sentence report prior to conviction. In brief, their position is that it would enable the judge to be prepared to sentence immediately upon conviction. If the judge, in rural areas, has to study long pre-sentence reports after conviction he may either have to read them hurriedly or postpone sentencing until his next visit

> with the consequence that the defendant may be in a marginal jail during the interim. The risk of prejudice to the defendant is minimal since the vast majority of cases involve ample fact and law issues, like alcohol tax cases, and most defendants plead guilty. It was suggested that the matter be referred to the Advisory Committee on Federal Rules of Criminal Procedure for such action as that committee deems appropriate.
>
> *Seminar & Institute on Disparity of Sentences*, 30 F.R.D. 401, 442 (1961).

What might be appropriate to bootlegging cases can hardly be appropriate to a case which calls upon the sentencing judge to impose either a twenty five year executed sentence or probation with no intermediate alternative and there are numerous other types of federal criminal cases where, as in this case, the trial and sentencing constitutes a very serious matter.

To uphold the decision of the Sixth Circuit in this case would be the equivalent of adopting the recommendation made at the Seminar & Institute on Disparity of Sentences which is quoted above. To impose a presumption of non-prejudice where a violation of Rule 32(c)(1) appears would be to impose an irrebutable presumption because, as a practical matter, the only method of making an affirmative showing of prejudice would be for the defense to undertake a demeaning interrogation of the trial court and to obtain full disclosure of the contents of the pre-sentence report. There are firm and long-standing policies which militate against both types of undertaking.

In its Memorandum in Opposition to the Petitioner's Petition for Certiorari the United States inserted a footnote saying that "At all events, there is no occasion to direct a new trial. Although we believe that such a hearing is not warranted here, petitioner's claim, at most, suggests a remand to the district court for inquiry into the precise factual circumstances of the reading and the question of

possible prejudice." This suggestion by the United States is not feasible for the reasons given above. There would be no opportunity for "inquiry into the precise factual circumstances of the reading" because substantial portions of what was read probably could not be disclosed and because there is no feasible procedure by which the defense could inquire into the acts and mental processes of a trial judge which occurred on or before May 31, 1967.

Counsel for the Petitioner also have noted that the United States has specially designated the entry showing the filing of a pre-trial mental exam to be shown in the single appendix. This suggests that the United States will seek to urge that there could have been no prejudice to the Petitioner as a practical matter because the trial court was required by the Petitioner's motion for a mental test to read a report of a type which typically contains more prejudicial material than the average pre-sentence report. Such an approach by the United States evidences a misunderstanding of what the Seventh Circuit meant by "prejudice" and overcoming the presumption of same. In the *Calland* case there was no deliberate violation of the rule as the pre-sentence report therein had been prepared and submitted to the trial court as the result of an earlier conviction of Calland and so there was no prejudice to the policies which Rule 32(*c*)(1) is intended to implement. The value and validity of pre-sentence reports would be greatly diminished if there were no assurance to those persons interviewed that there will be no disclosure of their statement to the accused if such disclosure would be against their interests and that there will be no disclosure to anyone outside of the probation office if the accused is never convicted. The preservation of the pre-sentence report as a useful institution can be achieved only by the implementing of Rule 32(*c*)(1) and that rule can be implemented and enforced only by the reversal of causes in which a deliberate violation occurs.

For the reasons given above it is respectfully submitted that the order of the United States Court of Appeals for

the Sixth Circuit affirming Petitioner's conviction should be reversed and this cause should be remanded with instructions to grant Petitioner a new trial.

II

A Presentence Investigation Conducted Before Conviction Without Consent or Without Intelligent Consent Is Inevitably Prejudicial to the Guilty Accused

No detailed information appears to be available showing the present extent of the practice among the districts of conducting pre-sentence investigations prior to conviction or the extent to which such districts engage in the practice without the consent of the accused. The Seminar & Institute on Disparity of Sentences, however, did disclose that at least 30 districts were authorizing such premature investigations as of 1961 and that some of them were permitting such investigations without the consent of the accused.

> *Preparation and Use of the Pre-sentence Investigation Report Prior to Conviction.* About thirty federal district courts currently permit the probation office to begin the pre-sentence investigation prior to conviction. In some of these districts this is done only if the defendant expressly waives any objection to preparing the pre-sentence report prior to conviction. Some federal district courts prohibit the practice entirely on the ground that it is contrary to the rights of the defendant, particularly if the pre-sentence report is read by the judge prior to conviction. A majority of those who discussed the question seemed to agree that the preparation of the report prior to conviction would in general be beneficial even to the defendant, since it would reduce his time in jail after conviction while awaiting his sentence. Under present Rule 32(c) of the Rules of Criminal Procedure, 18 U.S.C.A., the report cannot be disclosed to the judge and this adequately safeguards the defendant against possible prejudice. Therefore the consensus seemed to be that the early preparation of the pre-sentence report

with the consent of the defendant, is a desirable practice to follow in those districts where it will appreciably reduce the time spent in jail awaiting sentence.*

Seminar & Institute on Disparity of Sentences, 30 F.R.D. 401, 442 (1961)

In those districts where the probation service does obtain the consent of an accused before conducting a pre-sentence investigation prior to a verdict, finding or plea of guilty, the consent form used generally reads as follows:

> Defendant's Approval To Institute a Pre-sentence Investigation Before Conviction or Plea of Guilty
>
> I, name of defendant, hereby consent to a pre-sentence investigation by the probation offices of the United States District Courts. This investigation is for the purpose of obtaining information useful to the court in the event I should hereafter plead or be found guilty. By this consent I do not admit any guilt or waive any rights and I understand that any report prepared will not be shown to the court or anyone else until after conviction or plea of guilty.
>
> *Probation Form No. 13*

What this consent form in no way discloses or suggests to the accused is that the most important phase of the pre-sentence investigation and possibly the most important phase of the entire proceeding is to take place immediately after the execution of the form, i.e. the pre-sentence investigation interview of the accused.

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*The validity of the arguments made in this quote in favor of pre-arraignment pre-sentence investigations have, for the most part, been cancelled out by the subsequently enacted bail reform act and by the subsequently enacted act providing for credit for jail-time served prior to sentencing. The said arguments have a present validity only with respect to juveniles who, generally, are not bondable and whose pre-commitment housing very often is such as to militate against the likelihood of their subsequent rehabilitation.

A prime responsibility of the probation officer in adult investigation work is the preparation of a good pre-sentence report for the courts. The chief tool-in-trade used in accomplishing this is the personal interview with the defendant.

The Initial Interview with the Offender, Seymour I. Halleck, M.D. – Fed. Prob., March 1961, p. 23, 25.

Of course the most important step in the investigating process is that first interview with the defendant, and if you handle it skillfully you not only have the basis for a truly competent report, but you also have gone a long way toward launching the treatment job that must develop later.

The Probation Officer Investigates, Paul W. Keye, University of Minnesota Press, 1960, p. 21.

A good probation report should contain a discussion and evaluation of the subjective aspects of the offense including the offender's attitudes, values and orientations toward his offenses, his community, and authority in general.

Seminar & Institute on Disparity of Sentences, 30 F.R.D. 401, 441

The pre-sentence interview has a very substantial effect upon the opinion which is formed by the pre-sentence investigator and this impression has a very substantial effect upon the opinion finally reached by the Court as to whether the accused, upon his conviction, should be let to probation. But even in those districts where consent is obtained before the conducting of a pre-sentence prior to arraignment the accused is not advised that he should not consent unless he has, with the advice of counsel, reconciled himself to a conviction and intends to plead guilty. In the absence of such a mental reconciliation the accused is likely to earn the disapproval of the probation officer if that officer follows the dictates of the official publication on Pre-Sentence Reports which is provided by the Administrative Office of the United States Courts:

> The attitude of the defendant toward his offense is significant in determining whether he should be considered for probation. It must be kept in mind that some defendants may attempt to rationalize or justify their crime or even place the blame on someone else.
>
> *The Presentence Investigation Report*, Publication No. 103, Division of Probation, Administrative Office of the United States Courts, Supreme Court Building, Washington, D.C., Feb. 1955, p. 11.

The opinion which the probation officer forms with respect to the individual accused is, in turn, very influential upon the trial judge who will pronounce the sentence:

> Judges agree that mathematically identical sentences for the same offense are improper, unfair, and in themselves disparate. . . . What information is necessary to an informed decision? To state it simply, we must know the facts, and we must know the men. What are the sources from which we may obtain such necessary information? First and foremost, of course, is the pre-sentence investigation report of the Probation Officer.
>
> *Sentencing Institute-Fifth Circuit*, (1961) 30 F.R.D. 185; 282, Hon. Joe Estes, C.J., D.C.N.D. Tex.
>
> I have leaned heavily upon all pre-sentence investigative reports which I have received while on the federal bench and know that they have aided me greatly in giving just and proper attention to each case. The subject's statements to the probation officer are useful in determining the defendant's version of the facts and his general social attitudes.
>
> 21 Fed. Prob. 2:17, Je, 1957, Casper Platt, J.

Typically, in districts where pre-sentence reports are compiled prior to arraignment but only after the consent of the accused has been obtained, the interview with the accused takes place immediately after his arraignment before the Commissioner.

> The United States Commissioners in each division were then contacted. Each agreed to explain the consent form (Form No. 13) to the defendant and to give him an opportunity to sign it at the time he appeared at the commissioner's hearing. The commissioners agreed to mail the signed consent to the probation office.
>
> *Pre-Arraignment Investigations:* A Partial Solution to the Time Problem. Leon J. Sims, U.S. Prob. Off., Northern Dist. of Georgia, Fed. Prob. Vol. 28, No. 1, p. 24, 25 (1964)

Thus the accused is interviewed shortly after his arrest when his feelings of hostility will normally be at their peak and before he has had the therapeutic effect of a detailed conference with his attorney, time to reflect upon the matter and the opportunity to be present at his pre-trial proceedings in the District Court and to observe the system of justice working in his and in other cases. When an accused is first arrested and brought before a Commissioner, and this is particularly true in the case of a first offender, he usually is fearful and lonely and very willing to talk to someone at length and the opportunity to talk to a probation officer in confidence offers a welcome release. But at this early stage of the proceedings an accused who is not "jail-wise" will be far more likely to rationalize and attempt to justify his conduct and unwittingly condemn himself to an undeserved executed sentence.

To a substantial extent the Administrative Office of the United States Courts has encouraged the practice herein complained of by providing the most cursory type of consent form that conceivably could be drafted, by leaving the importance of obtaining the advice of counsel out of the form and by suggesting that the probation officer do this verbally and by indicating that the consent of the accused is merely desirable and not mandatory:

> Where a court is not continuously in session and the judge sits for only short periods in the various places of holding court a probation officer may find it difficult to complete the pre-sentence reports

within the limited time available. In these circumstances some courts request that investigations be conducted prior to conviction or plea. When such a request is made, the probation officer should ask the defendant after having advised him of his right to the advice of counsel, to sign the Probation Division's form authorizing the probation officer to institute the investigation. It is also desirable to have on file a letter from the defense attorney stating that he has no objection to the probation officer beginning the investigation prior to conviction or plea.

As provided by rule 32(c)(1) of the Federal Rules of Criminal Procedure, the pre-sentence investigation report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

The Presentence Investigation Report, Publication No. 103, Division of Probation, Administrative Office of the United States Court, Supreme Court Building, Washington, D.C. 20544, February, 1965, p. 4

While there can be no question that a pre-arraignment pre-sentence investigation often is beneficial to all parties concerned, particularly where the accused is in custody and is totally reconciled to conviction and punishment and desirous of shortening his period of jail-type custody it is nonetheless an inescapable fact that such early pre-sentence investigations constitute an unconscionably shoddy practice where the investigation is undertaken without consent or without a well-advised consent.

For the reasons given it is respectfully submitted that the prayed for remand and reversal of this cause should include a mandate to the effect that if the Petitioner should be convicted upon a new trial, no prior extra-judicial presentations to the trial court should be considered at the sentencing and, if a pre-sentence investigation should appear to be in order in view of that circumstance, that the said

investigation be conducted independently of the prior investigation.

It is further respectfully recommended that this Court should exercise its supervisory powers and direct the Administrative Office of the United States Courts to amend its above-quoted Form 13 to include a sufficient advisement and to amend its handbook to make the use of that form an absolute requirement.

III

Where a Presentence Investigation Is Initiated Before Conviction and Without the Consent of the Accused a Substantial Punishment Is Inflicted upon the Accused Without Legal Process

When a pre-sentence investigation is initiated the subject of the investigation becomes a topic of discussion between the investigators and the subject's past employers, school officials, pastors, business associates, neighbors, relatives and creditors. The following is a list of the areas of inquiry recommended in a recent issue of Federal Probation:

- Offense
  - Official version
  - Statement of Codefendants
  - Statement of witness, complainants and victims
- Defendant's version of offense
- Prior Record
- Family History
  - Defendant
  - Parents and Siblings
- Marital History
- Home and Neighborhood
- Education
- Religion
- Interests and leisure-time activities

Health
Physical
Mental and Emotional
Employment
Military Service
Financial Condition
Assets
Financial Obligations
Evaluative Summary
Recommendation.

It Is Respectfully Recommended, Fed. Prob., June, 1966, pp. 38, 39

If conducted as recommended by the literature in the field a pre-sentence investigation includes contacts with individuals known to the accused and whose opinion of the accused will be important and of value to the accused in his future life. Where a pre-sentence investigation is conducted prior to a verdict, finding or plea of guilty these important contacts of the accused necessarily are informed that a "presentence investigation" or "probation report" of him is being conducted and the unavoidable impression will be that the accused has been convicted of a crime. Certain of these contacts necessarily will have a very detrimental effect upon the reputation of the accused who has yet to be found guilty.

> A wide variation in practice is noted in verification of school records. . . . All except four offices, however, indicate some practice of verifying school records.
>
> * * *
>
> Since employment history is considered one of the most reliable indexes for the prediction of success or failure on probation or parole, federal offices routinely verify both past (in 83 offices) and present (in 89 offices) employment.

Presentence Investigation Practices in the Federal Probation System, Federal Probation, Sept. 1958, pp. 27, 28, 29.

> Religious affiliations are always a good source of information and help, not only for the investigation but for implementation of probation plans. Clergymen can be of great assistance in pointing out a client's strengths and outlining elements of a client's personality upon which you propose to build a probation program. Clergymen and lay members of a church may be of invaluable assistance in planning a work program.
>
> *Court Investigations and Reports,* Lawrence M. Stump, Federal Probation, June, 1957, pp. 9, 14.

When such investigations are made without consent, every defendant who eventually is found not guilty or is otherwise vindicated has suffered the irreparable harm and punishment of humiliating contacts with persons and offices whose opinions of him and entries relating to him are of substantial importance and value to him.

* * *

Thus there has been prejudice to the Petitioner by reason of the presumption that must attend the fact of record that the Petitioner's pre-sentence examination was submitted to and read by the trial court prior to Petitioner's conviction and there has been prejudice to the policies which Rule 32(c)(1) of the Federal Rules of Criminal Procedure is designed to implement. Accordingly, Petitioner prays for a reversal of this cause and that:

1. The mandate of this Court issue directing that Petitioner be granted a new trial.

2. That it further be directed that no pre-sentence investigation be conducted without Petitioner's consent unless and until Petitioner is convicted.

3. That it further be directed that if Petitioner should be convicted on the charge herein the presentence investigation heretofore made in this case shall be disregarded at the sentencing of Petitioner.

4. That it further be directed that if Petitioner should be convicted and if it should be deemed desirable to have

a pre-sentence investigation that the probation officer is to be directed by the trial court to conduct the investigation independently of the earlier pre-sentence report and to borrow no materials from the said report in completing said investigation.

Respectfully submitted,

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CITATIONS

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 453

JOHN McMILLAN GREGG, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 8) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1968. A petition for rehearing was denied on July 26, 1968 (A. 9). The petition for a writ of certiorari was filed on Wednesday, August 28, 1968, and was granted on November 12, 1968 (A. 10). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge in this case violated the provision of Rule 32(c)(1) of the Federal Rules of Criminal Procedure to the effect that the report of a presentence investigation shall not be submitted to the court unless the defendant has been found guilty and, if so, what should be the remedy for the breach.

2. Whether Rule 32(c)(1) authorizes the making of a presentence investigation before the guilt of the defendant has been determined and, if so, whether the rule is in this respect constitutionally or otherwise infirm.

RULE INVOLVED

Rule 32 of the Federal Rules of Criminal Procedure provides in pertinent part:

(a) *Sentence.*

(1) *Imposition of Sentence.* Sentence shall be imposed without unreasonable delay. * * *

* * * * *

(c) *Presentence Investigation.*

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment

thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

* * * * * *

(e) *Probation.* After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

* * * * *

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Western District of Kentucky under an indictment charging that he had robbed the custodians of a post office and put their lives in jeopardy by the use of a dangerous weapon, in violation of 18 U.S.C. 2114. On May 31, 1967, he was sentenced to imprisonment for twenty-five years, a mandatory sentence set by the statute.

1. The evidence showed that on July 11, 1966, at about 3:30 p.m., two men, armed with guns, robbed a contract station of the post office in Louisville, Kentucky of $488.60 and twenty-one blank money orders. One of the robbers, identified at the trial as petitioner, admonished one of the two women in the station "One false move out of you, I'll blow your brains out" (Tr. 31–44). One week later, petitioner was arrested for an Indiana bank robbery at an Indianapolis motel. He was found hiding in a closet with a pistol and canvas bag containing eighteen of the money orders stolen from the postal station (Tr. 162–167).

2. At petitioner's arraignment, the government filed a psychiatric report from the Springfield Medical Cen-

ter showing that petitioner was competent to stand trial (A. 4). Petitioner had been referred to the Center by a district court in Indiana, in connection with the Indiana bank robbery indictments. The Center's report, which is part of the original record on file in this Court, details substantial adverse information regarding petitioner's character and prior record, including a confession of involvement in the Indiana offense; a copy of the report was given to defense counsel in this case prior to the arraignment.

3. The jury returned its verdict of guilty at about 3:24 p.m. (Tr. 234). The court asked if that was each juror's verdict—to which they apparently answered *en masse*—and then called petitioner forward for sentencing. The court was advised that the statute imposed a mandatory twenty-five year sentence, and correctly stated that the sentence could be varied only by probation.[1] Defense counsel then requested that petitioner be released on bond until the following Monday, to permit him a visit with his wife and family. Counsel pointed out that petitioner had "a great number of years to serve in the Federal penitentiary on the crime that he has just now been found guilty of," and that to release petitioner for a few days before he "starts serving the years and years that he has facing him in prison" would not impose a great burden on the court (A. 5-6). When the judge indicated that he would deny this request, defense counsel

[1] Where a mandatory sentence must be imposed, the sentencing judge may not specify a period after which parole may be considered under 79 U.S.C. 4208(a), (c) See Public Law 87-752, Sec. 7, 72 Stat. 847.

asked for a presentence investigation. The court then stated (A. 7):

> "* * * A pre-sentence investigation has been made. It is before me now, and I have read it. It shows a juvenile record. It shows in 1960 this defendant stole an automobile in violation of the Dyer Act and was given an indeterminate youth commitment sentence. He was paroled in 1963. He was returned—no, he was paroled in '62, returned as a parole violator in '65 and was not released full time until May of last year.
>
> I am also informed that he was convicted of armed robbery in Yuma, Arizona, and given from seven to ten years. Several warrants are now pending against him for robbery with which he is charged.
>
> It will be the judgment of this Court that this defendant be sentenced to the mandatory 25 years. Custody of the Marshal.

These brief proceedings, taking up less than five full pages of the transcript, were concluded at about 3:30 p.m. (Tr. 239).

SUMMARY OF ARGUMENT

I

The record does not indicate that the trial judge received or read the presentence report in advance of the jury's verdict. Indeed, that seems unlikely. The sentencing proceedings, although brief, were long enough to allow a quick reading of the report. The judge had only to choose between granting probation and imposing a mandatory 25-year prison

term. He already knew the circumstances of the offense and petitioner's character and record, as shown by the psychiatric report he had received earlier. Thus, it would have required very little time to determine that the probation alternative was foreclosed. Since the record does not demonstrate that both the sentencing judge and the probation officer violated their clear duty under Rule 32, it should be presumed that they did not do so.

In any event, we do not believe a hearing is required to establish whether or not the Rule was violated. As in *Calland* v. *United States*, 371 F. 2d 295, 296 (C.A. 7), certiorari denied, 388 U.S. 916, "the facts in the record * * * effectually rebut the presumption of prejudice arising from [any] violation of rule 32(c)(1)." Disclosure of the report before conviction is forbidden in order to avoid prejudicing determination of the question of guilt. We find no ruling or statement by the judge which could have apprised the jury either of any prejudgment he may have made on that question, or of any information contained in the report. Moreover, the judge had similar information before him in a psychiatric report concerning petitioner's competency—a report which did not disqualify him from conducting petitioner's trial.

II

Petitioner complains that any pretrial investigation undertaken without consent may result in a harsher sentence or unwarranted prejudice to the accused's name in the community. Because these hypothetical effects would occur without regard to when

the report was delivered to the sentencing judge and on this record petitioner was subject to neither effect, we question whether this complaint is properly before this Court. Nonetheless, we show that Rule 32(c) permits presentence investigations to be begun in advance of verdict without the accused's consent. In the first preliminary draft of the Rule, it was provided that the presentence investigation should be made after determination of the question of guilt unless the defendant or his attorney consented to an earlier beginning. This provision was deleted, however, in response to widespread criticism of imposing any limitation on the timing of presentence investigations. Perhaps as a compromise, the provision forbidding disclosure of the report's contents prior to conviction was then added. The Rule has since been interpreted to authorize presentence investigation to be begun prior to conviction. Although probation officers do endeavor to obtain an accused's consent for such investigations, as they did in this case, they are not required to do so.

Even assuming that the effects of which petitioner complains might in some cases constitute "manifest injustice," they plainly did not do so in petitioner's case. Thus, he can obtain relief only if this Court holds that these effects not only exist and could constitute such injustice, but also are so serious and intractable that pre-trial investigation could never be tolerated in the absence of consent. But petitioner does not show that these effects in fact occur, or would rise to the level of a due process deprivation. In asking both recognition for a previously undefined

right and enforcement of that right on a sweeping scale, petitioner asks too much.

ARGUMENT

I

THE RECORD DOES NOT SUGGEST THAT THE TRIAL JUDGE RECEIVED AND READ THE PRESENTENCE REPORT IN ADVANCE OF THE JURY'S VERDICT, BUT IF HE DID, THERE WOULD BE NO REASON TO SET ASIDE THE CONVICTION IN THIS CASE

A. THE RECORD DOES NOT SHOW THAT THE TRIAL COURT RECEIVED AND READ THE PRESENTENCE REPORT BEFORE VERDICT IN VIOLATION OF FED. R. CRIM. P. 32(C)(1)

Rule 32(c)(1) provides that the presentence report should not be submitted to the court until the defendant has been found guilty. On the basis of the colloquy set forth in the Statement, *supra*, petitioner asserts and the court of appeals in its decision assumed that the judge had received and read the report before the verdict of guilty.

The record does not, however, require such a conclusion. Although it shows only a brief period of time to have been involved in the sentencing proceedings, that period is greater than need have been consumed by the limited proceedings transcribed. The transcript would not indicate when the courtroom was silent, or if the probation officer had quietly handed up a document to the court, or if the court was reading it. The report may have been very short and so arranged as to be quickly digested. Moreover, in this case, the judge did not require a great period of time to glean from the report what was relevant to his sen-

tencing decision, for he had only a very limited sentencing option—probation under 18 U.S.C. 3651, or the mandatory 25-year prison term of 18 U.S.C. 2114; not even the special parole eligibility option ordinarily afforded by 18 U.S.C. 4208(a) was open in this case. See Pub. Law 87-752, Sec. 7.

Facing this simple choice between alternatives, the judge need have looked to the report only for what might eliminate one of them, petitioner's extensive and very recent prior record. It is apparent from the judge's statement, quoted at p. 7 of the Appendix and p. 5, *supra*, that he had that part of the report spread before him at that time. Moreover, the judge was not dealing with an unfamiliar subject. He had heard testimony that defendant threatened to "blow [a woman's] brains out." Defendant's character and record had been before the court in the psychiatric report relating to defendant's competence to stand trial; no one reading that report could have supposed that, in the event of conviction, immediate probation would seem a suitable disposition. The whole case stems from the fact that the judge said "I have read" the presentence report. The judge could "have read" by a glance the record with which he already had some familiarity and have known enough to make the decision that he was not going to put defendant on probation. Thus, it was not impossible for the judge to have received the probation report after verdict and then to have read enough of it to make the statement he did to counsel.

That being so, the presumption is that the trial judge discharged his official responsibility properly and did

not violate the Rule. See *Wilson* v. *United States*, 369 F. 2d 198, 200 (C.A.D.C.); *Ferrari* v. *United States*, 169 F. 2d 353 (C.A. 9); *Turberville* v. *United States*, 303 F. 2d 411, 417 (C.A.D.C.), certiorari denied, 370 U.S. 946; *Stearns Co.* v. *United States*, 291 U.S. 54, 63. The judge, who was appointed to the district court in 1954, was undoubtedly familiar with the Rule. Indeed, he had participated in the 1961 Seminar and Institute on Disparity of Sentences which petitioner cites (Pet. Br. at 9–10), at which some participating judges had suggested amending the Rule to allow pre-verdict reading of the presentence report. 30 F.R.D. 401, 408, 442. While it does not appear whether the judge supported this suggestion, he must have been aware that the Rule had not been thus amended.

The assertion that the presentence report was prematurely delivered and read also involves the assumption that the probation officer concerned was acting in violation of the Rule. Again, the presumption must be to the contrary. In addition to the Rule itself, the United States Probation Officers Manual (1962) explicitly forbids delivery of the report prior to conviction. 16.37 and Appendix A-6.10; see, also, Administrative Office of the United States Courts, *The Presentence Investigation Report* (1965), p. 4. We are informed by the United States Attorney's Office that the practice in the Western District of Kentucky is for the probation officer to wait in or near the courtroom for the jury to return its verdict and then, if a guilty verdict has been returned and a presentence report has already been prepared, personally to deliver that report to the trial judge on the bench. In

his appellate brief, Mr. Huddleston, the Assistant United States Attorney responsible for trying the case, indicated that his recollection was that the report in this case had, in fact, been delivered to the judge after the verdict was received.[2]

B. EVEN ASSUMING THAT THE REPORT WAS PREMATURELY DELIVERED AND READ, PREJUDICE NEITHER APPEARS NOR WAS POSSIBLE ON THIS RECORD, AND THERE IS THEREFORE NO REASON FOR PETITIONER'S CONVICTION TO BE SET ASIDE

If the Court finds that the presumption of regularity is overcome on this record, the ordinary remedy would be a remand to determine if in fact the trial judge saw the report before verdict. If he did, the question of remedy would arise. In the government's view, an order setting aside the conviction for new trial would be a suitable remedy only if prejudice to the jury's determination of guilt or innocence appeared or must be presumed on this record.

In *Smith* v. *United States*, 360 U.S. 1, Mr. Justice Clark and two other members of this Court characterized a private conference between a trial judge and an F.B.I. agent about a defendant's offense and background as being in the nature of a pre-sentence report

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[2] Appellee's Brief below, at pp. 9-10:

> The record does not reflect that the presentence report was obtained by the judge prior to the announcement of the verdict. But appellant asserts it anyway (Appellant's Brief, page 16). Appellee's counsel can refute this assertion only by stating that his recollection is not the same as that of defense counsel.
>
> However, in an attempt to avoid a "swearing contest," appellee cites *Calland* v. *United States*, 371 F. 259 (7th Cir. 1966), cert. denied 388 U.S. 916, to support the denial of this appeal. * * * Surely appellant is alleging no more than what was condoned in *Calland*.

governed by Rule 32. Because the conference was held before the judge determined whether or not to accept the defendant's guilty plea, they found it violative of the Rule and "presumptively prejudicial," and would have permitted the defendant to withdraw his plea and go to trial. *Id.* at 18. In *Calland* v. *United States,* 371 F. 2d 295 (C.A. 7), certiorari denied, 388 U.S. 916, however, a jury was the trier of fact and the judge had not received the presentence report until all evidence had been submitted and final arguments by counsel were about to begin. Stating that a presumption of prejudice arose from this violation of Rule 32, the court nonetheless rejected "the inference that his inadvertently premature examination of the probation report * * * in any way contributed to or influenced [the] finding [of guilt]" and held "that the facts in the record * * * effectually rebut the presumption of prejudice arising from the apparent violation of rule 32(c)(1)," citing Mr. Justice Clark's opinion in *Smith,* 371 F. 2d at 296.

The basic reason for forbidding disclosure of the contents of a probation report before conviction is that the report may contain material inadmissible on the question of guilt, see *Williams* v. *New York,* 337 U.S. 241, but which might prejudice the determination of that question if available to the trier. *Warren* v. *Richardson,* 333 F. 2d 781, 784 (C.A. 9); *United States* v. *Christakos,* 83 F. Supp. 521, 525 (N.D. Ala.), affirmed *sub nom. Woolard* v. *United States,* 178 F. 2d 84 (C.A. 5); 5 Orfield, *Criminal Procedure under the Federal Rules* (1967), § 32.35. If, then, as in *Calland,* the record shows no possibility of such prejudice occurring, any presumption of prejudice arising from

the fact of violation of the rule is overcome. This Court has stated that even constitutional error does not require a new trial where harmlessness to the determination of guilt or innocence appears beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18. No more stringent standard should apply to a possible violation of the Rules with respect to premature consideration of a probation report.

In this case, lack of prejudice to the jury's determination of guilt does appear beyond a reasonable doubt. At no point in the proceedings did the trial court comment upon the evidence. Nor did he make rulings adverse to the defendant which might have been prompted by prejudice resulting from premature inspection of the report. Petitioner does not suggest how the jury might have learned of or been influenced by the judge's views.

Moreover, there is no reasonable basis for believing that premature reading of the presentence report in this case could have influenced the judge's views beyond what was properly communicated to him in the psychiatric report dealing with the question of petitioner's competency. That report thoroughly detailed petitioner's background, his sociopathic character, his recent robbery of an Indiana bank, and his prior criminal record. Once competency was put in issue, it was the court's duty to keep the material in mind, in the event petitioner's trial conduct raised new doubts. *Dusky* v. *United States,* 362 U.S. 402; *Feguer* v. *United States,* 302 F. 2d 214 (C.A. 8), certiorari denied, 371 U.S. 872. That a trial judge becomes familiar with a defendant's background—

whether from a psychiatric report, earlier trials, or trials of the defendant's confederates—neither disqualifies him from presiding at trial nor makes any of his trial rulings suspect. See *Smith* v. *United States*, 360 F. 2d 590, 592 (C.A. 5); *United States* v. *Sansone*, 319 F. 2d 586 (C.A. 2); *Cox* v. *United States*, 309 F. 2d 614 (C.A. 8); *United States* v. *Chrisos*, 291 F. 2d 535 (C.A. 7), certiorari denied, 368 U.S. 829. The ability to disregard irrelevant material in making decisions is one of the attributes that a competent judge must possess. There is thus no reason for a remand and further litigation in this case.

II

RULE 32(c) VALIDLY AUTHORIZES PRESENTENCE INVESTIGATIONS TO BE BEGUN BEFORE CONVICTION, WITH OR WITHOUT THE ACCUSED'S CONSENT

Petitioner interprets this Court's order limiting the grant of certiorari to "the questions raised in the case with respect to Rule 32(c)(1)" (emphasis added, see Pet. Br. 3) as also bringing before the Court the question whether a presentence investigation may ever be begun before verdict without the accused's consent, even though the results of that investigation are not communicated to the court until after conviction. Although petitioner's argument was mentioned in passing in the body of his petition (at p. 8), it is not readily comprised in his demand for new trial because of presumed prejudice to the determination of guilt, under *Smith* and *Calland*, *supra*, pp. 11-12, which was the basis of the petition and the decision below. The argument relies on two claims of

"prejudice": that probation officers will get a poorer view of defendants if they interview them before conviction, leading to speculatively sterner sentencing recommendations; and that if members of the accused's community are interviewed before his conviction, they will be prejudiced against him or led to believe in his guilt prematurely. Both of these forms of claimed prejudice would occur whether or not the report was timely delivered to the court; it is not shown how either could influence the determination of guilt or innocence.

Assuming the question to have been raised, petitioner can claim neither form of putative prejudice. We are informed that petitioner was not interviewed prior to his conviction; nor was there any need to do so once he was convicted,[3] given the very limited nature of the sentencing choice open to the court and the inescapable effect of petitioner's prior record and the character revealed by the psychiatric report—itself the product of recent interviews. Thus, it is unbelievable under the circumstances that petitioner's sentence was affected by the fact of a pre-conviction presentence investigation. Nor, in view of petitioner's very recent confinement and past record, is this a case where his reputation might be unfairly damaged if he became a "topic of discussion between the investigators and the subject's past employers, school officials, pastors, business associates, neighbors, relatives and creditors" (Pet. Br. 15). And, in view of the charges of

[3] We are informed that it is the practice to hold such an interview after conviction if, under the circumstances, it appears possibly helpful.

two armed robberies within months after release from confinement, there would be good reason to minimize, so far as possible, any delay in getting petitioner back into confinement if he were found guilty. Thus, treated as a matter of discretion, the early investigation without consent in this case was fully justified.

In any event, we believe that pre-conviction presentence investigations were fully considered and authorized when Rule 32 was adopted, and that the Rule in this respect does not offend the Constitution or other governing policy.

A. RULE 32(C) PERMITS PRESENTENCE INVESTIGATIONS TO BE BEGUN IN ADVANCE OF VERDICT WITHOUT THE ACCUSED'S CONSENT

In authorizing a presentence investigation, Rule 32 (c)(1) provides:

> *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

The rule thus limits the time when the report may be submitted to the court or its contents disclosed. It does not, however, impose any restriction upon the time when the probation service may commence its investigation. By implication, therefore, it permits a presentence investigation to commence prior to a verdict of guilty whether or not the defendant consents to such an investigation.

The history of the rule confirms this implication. In May 1943, proposed Rule 30(c) of the Advisory Committee's first Preliminary Draft provided:

> "*When Made.* Before the imposition of sentence or the granting of probation, save in cases where the district court otherwise directs, the probation service of the court shall make a presentence investigation and report to the court. *The presentence investigation shall be made after determination of the question of guilt unless the defendant or his attorney consents in writing that it be made earlier.*" [Advisory Committee on Rules of Criminal Procedure, Federal Rules of Criminal Procedure, Preliminary Draft (1943), p. 130; emphasis supplied.]

No restriction was placed on the court's right to examine the report if it was prepared early. Comments to the draft stated that it "continues the present practice in some districts of making the investigation after determination of the question of guilt but it also permits the continuation of the practice in others of making the investigation earlier in the proceeding if the defendant consents. The advantage of making the investigation earlier is that the probation service has ample time to investigate the case thoroughly and prepare an adequate report for the court prior to the date of sentence" (*id.* at 132–133).

After this draft was published, several district judges expressed doubt to the Advisory Committee that a defendant would consent to a presentence investigation before conviction, suggesting that such investigation should be permitted upon request of the

district judge. "The great bulk of the comments * * * objected to limitation of presentence investigation to the time after conviction," since most defendants pleaded guilty or were convicted and early investigation would prevent delay. 5 Orfield, *Criminal Procedure under the Federal Rules* (1967), § 32.2, p. 160.

The second Preliminary Draft, dated February 1944, omitted the limitation of presentence investigations before conviction to cases in which a defendant consents. Thus, proposed Rule 34 stated only that the "probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs." Comments to the draft noted that "[t]he Probation Act * * * does not specify the point in the proceedings when the presentence investigation may be made," citing state laws keyed, on the one hand, to conviction and, on the other, to indictment. Advisory Committee on Rules of Criminal Procedure, Federal Rules of Criminal Procedure, Second Preliminary Draft (1944), p. 128. Responding to the clear implication of the change, several judges commented that they opposed any investigation before conviction. Orfield, *supra*, 165–166.

The next and final draft of the Rules added the second sentence of Rule 32(c)(1), the sentence ostensibly in issue in this case: "The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty." This provision appears to be

a compromise between those who wished to be free to make an early start on presentence investigations and those who feared prejudice to the determination of guilt if the results of such investigations could be known before conviction. The subdivision was adopted as thus amended.

The Rule has consistently been treated as authorizing the initiation of presentence investigations prior to conviction. Thus, a 1957 survey showed that thirty of ninety-seven probation offices regularly began presentence investigations prior to a plea or finding of guilt, and twenty-two others stated that they occasionally did so. The Federal Probation Training Center, *Presentence Investigation Practices in the Federal Courts* (1957), p. 19; Seminar and Institute on Disparity of Sentences, 30 F.R.D. 401, 442. The differing practices are responsive to the wishes of the particular courts concerned. United States Probation Officers Manual, ¶6.12; Administrative Office of the United States Courts, *The Presentence Investigation Report* (1965), p. 4. While these materials encourage the officers concerned to seek an accused's consent for any pre-conviction investigation—as we understand petitioner's consent was sought in this case—they do not make such consent a prerequisite, and it has never been held to be so. That requirement was considered in the preliminary draft of the Rules, but rejected in subsequent versions. In the absence of compelling constitutional or other reasons for now

reading the requirement into the present rule, any change should come through formal amendment of the Rules[4] rather than litigation.

B. NEITHER CONSTITUTIONAL NOR OTHER GOVERNING PRINCIPLES REQUIRE THAT PRESENTENCE INVESTIGATIONS NEVER BE COMMENCED IN ADVANCE OF CONVICTION UNLESS THE ACCUSED CONSENTS

Petitioner claims that pretrial investigation of a presentence nature constitutes a "manifest injustice" to an accused if undertaken without his consent. In so arguing, he appears to be invoking constitutional arguments of due process, or the closely related standards which this Court evolves in supervising the administration of justice in federal courts. However, he does not make a persuasive showing even that particular cases might involve such abuse of discretion as to offend these standards; he fails entirely to show, as he must, that the harms alleged are so inevitable or otherwise intractable as to require this Court to forbid such investigations in all cases.

Petitioner bases his claim of "manifest injustice" on two factors: A hypothetical effect on the evaluation of an accused if he is interviewed before trial,

[4] Beginning in December 1962, the Advisory Committee submitted preliminary drafts of proposed amendments to the Federal Rules of Criminal Procedure to this Court. No proposed draft amendment dealing with the time that a presentence investigation could be made, or the time when it could be read by the court, was submitted. The Committee did submit and this Court adopted an amendment to Rule 32(c) which permits a court to disclose to the defense, before imposing sentence, all or any part of the material contained in the presentence investigation report.

when his principal concern is said to be with demonstrating his innocence, and a hypothetical effect on an accused's reputation in the community, if his acquaintances are interviewed in a manner suggesting his guilt before guilt is established. But petitioner offers no hard evidence that in fact these effects occur; nor does he cite prior cases or other materials suggesting that they rise to the level of a deprivation of due process, even in particular cases.

Both factors are readily controlled by the conscientious probation officer or judge. Thus, the investigating officers will quickly learn to discount any hostile or suspicious attitude which he encounters before trial. Probation officers are cautioned to conduct pretrial inquiries "in a way that cannot prejudice the defendant in the trial" and urged to seek the defendant's understanding. United States Probation Officers Manual, *supra*, ¶ 6.12. In cases where it seems important to do so, the interview can be postponed until the verdict is in. Moreover, the timing of the investigation will be evident to the court and to counsel at the sentencing proceedings; the question can be raised at that time and further interviews held if it seems useful. Finally, the investigating officer can tell any members of the defendant's community he speaks to before trial that the question of guilt has not yet been settled.

> The primary objective of the presentence report is to focus light on the character and personality of the defendant, to offer insight into his problems and needs, to help understand the

> world in which he lives, to learn about his relationships with people, and to discover those salient factors that underlie his specific offense and his conduct in general. It is not the purpose of the report to demonstrate the guilt or the innocence of the defendant. [*The Presentence Investigation Report, supra,* p. 1.]

It is entirely consistent with this objective to be frank about the posture of a pending case; petitioner has not shown that probation officers behave otherwise, individually or generally, in carrying out their duties.

But even assuming that in some cases there might be an abuse of discretion warranting some measure of relief, it is plain for the reasons already stated that no such abuse occurred in petitioner's case. Thus, petitioner must argue that in *no* case should a presentence investigation be authorized in advance of conviction without the accused's consent, that a prophylactic rule is required to avoid those cases in which the claimed effects would occur. But this argument supposes not only that these effects occur and are intolerable, but also that they could not be avoided by some less sweeping measure. In the past, this Court has approached prophylactic measures slowly, after the accrual of what it has found to be weighty evidence that lesser measures will not suffice to protect the rights concerned. *E.g., Mapp* v. *Ohio,* 367 U.S. 643; *Miranda* v. *Arizona,* 384 U.S. 436. Petitioner here asks in one breath the recognition of a previously unrecognized "right" and the enforcement of that right on a sweeping scale. He is asking too much.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 453

JOHN McMILLEN GREGG,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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SUBJECT INDEX

CASE AUTHORITY

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In the petition for certiorari which was filed in this cause, there were two questions presented and certiorari was granted as to the first which is set forth in the footnote.[1] The Order Allowing Certiorari which was filed

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[1] "Whether a convicted defendant is entitled to a new trial where the presiding judge has read his pre-sentence report prior to the end of his trial contrary to the express provisions of Rule 32(c)(1) of the Federal Rules of Criminal Procedure and there is nothing in the record to rebut any presumption of prejudice. To this question the Seventh Circuit has answered 'yes' in *Calland* v. *United States*, 371 F.2d 295, 296 (1966) while the Sixth Circuit has answered 'no' where the issue was presented in Petitioner's cause" (Petition, p. 2).

herein in no way altered the statement of the said issue.[3] The petition for certiorari in no way invoked any Constitutional provisions. Neither the Constitution nor any Constitutional phrase was mentioned in any part of the petition and the final sentence of that portion of the petition which resulted in the granting of the writ in no way, directly or indirectly, addressed itself to a constitutional question.[4] In its Memorandum in Opposition the United States likewise made no mention of the Constitution or any Constitutional provision although the possibility of a Constitutional question impliedly was suggested in the invoking of Rule 52 of the Federal Rules of Criminal Procedure (Memorandum in Opposition, p. 4).

Consistent with the position originally taken in the petition and with the order granting certiorari, the Brief for the Petitioner invoked no Constitutional provision and made no mention of the Constitution. The Brief for the United States, however, which was filed in response to the petitioner's brief on the merits, has injected the Constitution of the United States into these proceedings, directly on pages 4, 7 and 13 of the said brief and indirectly elsewhere in said brief. These casual injections of Constitu-

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[3] "The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, limited to the questions raised in the case with respect to Rule 32(c)(1) of the Federal Rules of Criminal Procedure and the case is placed on the summary calendar" (Appendix, p. 10).

[4] "It is the Petitioner's position that the foregoing presentation demonstrates that not only does the question herein involve a conflict between circuits, it also involves a question of manifest social importance and a further question as to whether the supervisory powers of this Court should be invoked for the purpose of eliminating the practice of conducting pre-sentence investigations prior to conviction without the consent of the accused" (Petition, p. 8).

tion considerations by the United States have been exploited by the United States as a basis for injecting harmless-vs-prejudicial-error considerations from a substantive standpoint. Such considerations are alien to this case as it was presented to and accepted by this Court.

The Brief for the United States proceeds to urge harmless error on the numerous grounds which are quoted in the footnote.[4] The government's presentation on harmless error would be conclusive, if relevant and it would be relevant if the question before the Court were a Constitutional question; but the question before the Court is not

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[4] The following quoted statements urging harmless error appear on the following pages of the Brief for the United States:

a. "We find no ruling or statement by the judge which could have apprised the jury either of any pre-judgment he may have made on that question, or of any information contained in the report" (p. 6).

b. "Even assuming that the effects of which petitioner complains might in some cases constitute 'manifest injustice,' they plainly did not do so in petitioner's case" (p. 7).

c. "Even assuming that the effects of which petitioner complains might in some cases constitute 'manifest injustice,' they plainly did not do so in petitioner's case" (p. 7).

d. "That being so, the presumption is that the trial judge discharged his official responsibility properly and did not violate the rule" (pp. 9, 10).

e. "In the government's view, an order setting aside the conviction for new trial would be a suitable remedy only if prejudice to the jury's determination of guilt or innocence appeared or must be presumed on this record" (p. 11).

f. "Petitioner does not suggest how the jury might have learned of or been influenced by the judge's views. Moreover, there is no reasonable basis for believing that premature reading of the pre-sentence report in this case could have influenced the judge's views beyond what was properly communicated to him in the psychiatric report" (p. 13).

g. "It is unbelievable under the circumstances that petitioner's sentence was affected by the fact of a pre-conviction pre-sentence investigation" (p. 15).

a Constitutional question and the government's said presentation is not relevant. An appropriate example showing the government's approach is the Solicitor General's assertion at page 13 of the Brief for the United States that "there is no reasonable basis for believing that premature reading of the presentence report in this case could have influenced the judge's views." This statement says nothing and, at the same time, says too much[5] and it entirely begs the question which is the foundation of this appeal, that is, the question posed by Justice Clark and two concurring Justices in his separate opinion in *Smith* v. *United States*, 360 U.S. 1.[6]

Judges presumably are above being influenced by improper, extraneous matter and the proposition that a judge's rulings on the admissibility of evidence and on trial procedures could be affected by a loathing or a liking

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[5] The quoted statement says "too much" because it and similar observations in the Brief for the United States effectively demonstrate that the Solicitor General's "harmless error" argument would be equally applicable to almost every conceivable case, however deliberate and substantial the violation of Rule 32(c)(1) might be. It is necessary for the mind to construe a ridiculous hypothetical where a trial judge not only read the pre-sentence report during trial but regaled the jury with some of its more interesting highlights in order to imagine a situation where the record would reflect a probability that the jury's verdict was affected by the premature reading. The Solicitor General's argument on this point would render it permissible to violate the rule in all jury cases and, in this respect, the argument says "nothing" because it speaks of "Harmless error" in a context where there is no counterpart.

[6] At 360 U.S. 17, Justice Clark disclaimed substantive considerations stating: "I do not reach the due process contention for it appears to me that our duty of supervision over the administration of justice in the federal courts requires reversal because of this interview. In a criminal case, such a private conference must be deemed presumptively prejudicial where, in violation of Fed. Rules Crim. Proc. 32(c)(1) it was conducted prior to the plea.

for an accused because of what he has read or heard about him is the type of proposition that only a pre-law student would consider interesting or pertinent to a consideration of what rules of criminal procedure should be implemented and enforced. The task of ruling on objections and other matters which arise at a trial is tedious work, interesting only in an academic sense and hardly susceptible to emotional influences. Certainly, Justice Clark and the two concurring members of the Court were not concerned with protecting judges from undue influence in the same manner that jurors must be protected when they rendered their opinion in *Smith* v. *United States, supra.*

What is at issue here is not the question of prejudice to the petitioner's opportunity to be found not guilty at his trial or prejudice to his hopes for probation or prejudice to any of his substantive rights or privileges. What is at issue on the question of prejudice, is that of prejudice to the federal system of criminal justice. The question is that of whether the conduct of the trial judge and local probation office in this case (as such conduct was found and determined by the Sixth Circuit[1]) constituted such a

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[1] The Brief for the United States contains a substantial amount of testimony of alleged facts being injected into this appeal for the first time and relating to the question of whether the trial judge actually read the pre-sentence report before the jury returned with its verdict. In the direct appeal of this cause the Sixth Circuit found "the facts that the District Judge had seen the pre-sentence investigation report prior to the time when the jury returned its verdict" (Appendix, p. 10). Upon that finding the Sixth Circuit entered the ruling which the Petition for Certiorari herein asserted was in conflict with the law in the Seventh Circuit. The Solicitor General's efforts to have the appellate finding of the Sixth Circuit set aside beg the question entirely because the Sixth Circuit's questioned interpretation of Rule 32(c)(1) would remain in effect and in conflict with the interpretation of the Seventh Circuit.

procedural irregularity as to require an exercise of the supervisory powers of this Court in the enforcement of Rule 32(c)(1) of the Federal Rules of Criminal Procedure.

The F.B.I. Agent who talked to the judge in chambers in the *Smith* case prior to Smith's plea of guilty was given an inside track and both the agent and the Assistant U.S. Attorney who arranged the conference and their fellow government agents and attorneys were caused to have a misconception as to their proper relationship with the courts by the trial court's conduct in that case and, undoubtedly, the appellant, Smith, had the most serious misgivings and feelings of being wronged when the fact of the premature conference was revealed on the record after Smith had entered a plea of guilty and thrown himself on the mercy of the court. The damage to the trial court and the federal system of criminal justice in that case was considerable. In the present case the facts were different but the overall effect was the same. The petitioner, immediately after his trial, learned that the judge already had read a necessarily one-sided investigation of him which he had refused to consent to[*] and which he naturally assumed had not taken place. The tender of the consent form to the petitioner when his permission was sought had been a fraud because it constituted a representation that there would be no pre-trial probation investigation unless the form were executed. The trial judge, pursuant to Rule 32(a) of the Federal Rules of Criminal Procedure, invited the petitioner to say anything he wished to say in

[*] On page 19 of the Brief for the United States there is the following statement: "As we understand petitioner's consent was sought in this case." This statement corresponds with counsel for the petitioner's recollection of the matter, that consent was sought and refused.

his own behalf without indicating that there was anything known to the court which had not been presented formally in the record. It was only after the petitioner had spoken that the trial court revealed that the pre-sentence investigation which the petitioner had refused to consent to had been completed and read by the court and the trial court went directly from that revelation to sentencing without any further questions to the petitioner. The petitioner's situation was that of being asked to speak in his own behalf in response to the trial and conviction which had just taken place (and at which he had not testified and his record had not been revealed) and then being informed that the questioner had in his possession the adversary party's trump card, an unconsented to report of an investigation in which the government's agents had been interviewed but not the petitioner and which contained allegations the petitioner never had an opportunity to explain. The situation was inherently unfair.

Numerous arguments are advanced by the United States which urge that nothing more than a remand for a hearing and re-sentencing is needed in this case because it should be presumed that judges and probation workers will perform their respective roles correctly without any re-structuring of the system by this Court in the exercise of its supervisory powers and without the granting of a new trial because of the violation of Rule 32(c)(1).* An

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*Such guidelines should contain a flat ruling that pre-arraignment pre-sentence investigations are not to take place without the intelligent consent of the accused. Counsel for the petitioner do not dispute the Solicitor General's claim that pre-sentence investigations very frequently are undertaken before arraignment where consent is refused and that representation is hereby accepted as a fact to be considered as such by this Court. Counsel for the petitioner do not believe that the frequency of this type of violation

incident which has taken place in the course of this appeal demonstrates that the Solicitor General's position is ill-taken. On January 21, 1969 the Solicitor General wrote to the Chief Probation Officer of the trial court (see Appendix A) and requested him to send a copy of the petitioner's probation report to the Clerk of this Court (presumably by mail and therefore presumably under seal). The petitioner had no objection to this and still has none.

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of Rule 32(c)(1) vests the practice with legality. The practice clearly does violate the following provision in the rule: "The probation service of the court shall make a pre-sentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs." The words "otherwise directs" inescapably imply that it was contemplated by the rule that the cause would be before the district court before the investigation would be initiated because if it were not before the district court the court would be in no position to "otherwise direct." The federal probation literature which has been cited by both parties in this action shows that these early pre-sentence investigations are initiated at the time of the commissioner's hearing (see Brief for the Petitioner, p. 13). Where consent is obtained the investigation is launched by an agreement which is in no way contrary to the public policy embodied in Rule 32(c)(1) but where the early pre-sentence investigation is launched without consent, over objection, before arraignment, before indictment, and even before probable cause is found (in cases where the probable cause hearing is continued and this frequently happens where probable cause isn't waived) the violation of the clear provisions of the rule is manifest. Apart from the fact that the complained of practice violates the rule, petitioner's counsel believe that the following practical considerations require a firm mandate that no pre-arraignment probation investigations take place without consent. (1) The literature in the field is unanimous in reporting that such investigations are harmful and invalid because the interview of the accused is an essential cornerstone to a valid inquiry. (2) A premature investigation of an impoverished, lower-class accused who intends to fight the charges against him would have an intimidating effect upon the family, friends and potential character witnesses who would be interviewed and whom the accused must call upon for support (assuming that they are of his same lower economic class). (3) A premature investigation of an individual accused of a white collar crime could have a very severe effect upon him socially and economically.

Then, concurrent with the receipt of the Brief for the United States, petitioner's counsel learned through another letter (see Appendix B) that the said chief probation officer for the trial court sent the report instead to the office of government counsel and at government counsel's behest it now is in the office of the Clerk of this Court and open to the inspection of all counsel on the case without any court order having been issued. Rule 32(c)(2) of the Federal Rules of Criminal Procedure very clearly provides against such disclosure of a pre-sentence report:

> The court before imposing sentence *may* disclose to the defendant or his counsel all or part of the material contained in the report of the pre-sentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

If the above-quoted portion of Rule 32(c)(2) is to be given an interpretation that is at all consistent with its plain meaning it necessarily follows that the rule has been breached severely during the appeal in this cause. Under these circumstances it is difficult to accept the Solicitor General's suggestion that the substantive harmless-error rule should prevail with respect to Rule 32(c) because it should be presumed that probation officers and trial judges will do their jobs properly. Carried to their logical conclusion, such presumptions would justify the elimination of the appellate process. With respect to this case and the issues herein, it should be sufficient to note that a shambles has been made of Rule 32(c) by actions occurring even at the highest administrative level. A disposi-

tion of this cause without the ordering of a new trial would be a toothless gesture leaving Rule 32(c) with merely an advisory force and effect. The rule itself has been ignored frequently and unless the decision in this cause contains clear and unmistakable guidelines and an order setting aside the conviction, it could not be expected to have any more effect than the provisions of Rule 32(c) have had.

WHEREFORE, petitioner renews the prayer for relief made in the conclusion of his brief on the merits.

DEAN E. RICHARDS
JAMES MANAHAN
Attorneys for Petitioner

Of Counsel
PALMER K. WARD

APPENDIX A

[EMBLEM]

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

January 21, 1969

Mr. Frank Saunders
Chief Probation Officer
Western District of Kentucky
Federal Building
Louisville, Kentucky 40202

Re: United States v. John McMillan Gregg
Criminal Action No. 26,745 (W.D.Ky.)

Dear Mr. Saunders:

The above case is being reviewed by the United States Supreme Court on writ of certiorari. The central issue centers on a presentence investigation report which your office prepared. In reviewing this case, the Supreme Court may wish to examine the contents of this report. Would you kindly send a copy of the report to the Clerk of the Supreme Court so that it will be available for examination by the Justices of the Supreme Court.

Sincerely,

ERWIN N. GRISWOLD,
Solicitor General.

cc: Mr. Dean E. Richards
156 East Market Street
Indianapolis, Indiana 46204

APPENDIX B

[EMBLEM]

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

February 7, 1969

Honorable John F. Davis
Clerk
United States Supreme Court
Washington, D. C. 20543

Dear Mr. Davis:

Re: John McMillan Gregg v. United States, No. 453, this Term

Lodged herewith is the presentence record made regarding petitioner in the abeve case. We had requested that the report be sent directly to you so that the Justices might if they wished consult it in connection with their consideration of this case. As the report has been sent instead to our office, we believe it should now be placed with the record and made available to counsel for petitioner before hearing of the case.

Sincerely,

Erwin N. Griswold
Solicitor General

cc:
Dean E. Richards, Esq.
155 Market Street
Indianapolis, Indiana 46204

SUPREME COURT OF THE UNITED STATES

No. 453.—October Term, 1968.

John McMillan Gregg, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April 2, 1969.]

Mr. Justice White delivered the opinion of the Court.

One afternoon, petitioner and another man robbed the post office at Louisville, Kentucky, at gunpoint. Two women were in charge of the post office, which had just closed, and petitioner warned them: "One false move out of you, I'll blow your brains out." They were then tied and gagged. A week later a bank in Indiana was robbed. Petitioner, found hiding in a motel closet with a pistol, and money orders stolen from the post office, was arrested for the bank robbery. After a one-day trial and 18 minutes of jury deliberation, petitioner was convicted of jeopardizing the lives of the postal custodians while robbing them.[1] The offense carries a mandatory sentence of 25 years.

Immediately after the jury returned its verdict the jurors were polled and the judge, noting the mandatory 25-year sentence, invited petitioner and his lawyer to

[1] "Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years." 18 U. S. C. § 2114.

exercise the right of allocution. Both asked that petitioner be allowed to spend a few days with his family before commencing to serve the sentence. The judge refused, and counsel for petitioner asked that a presentence investigation be made. The judge interrupted:

> "A presentence investigation has been made. It is before me now, and I have read it. It shows a juvenile record. It shows in 1960 this defendant stole an automobile in violation of the Dyer Act and was given an indeterminate youth commitment sentence. He was paroled in 1965. He was returned—no, he was paroled in '62, returned as a parole violator in '65 and was not released full time until May of last year.
>
> "I am also informed that he was convicted of armed robbery in Yuma, Arizona, and given from seven to ten years. Several warrants are now pending against him for robbery with which he is charged."

Petitioner seeks a reversal of his conviction, asserting as his sole substantial argument that this record reveals that the trial judge had read the presentence report before the jury returned its verdict, in violation of Rule 32 of the Federal Rules of Criminal Procedure.[2]

[2] "(a) *Sentence.*

"(1) *Imposition of Sentence.* Sentence shall be imposed without unreasonable delay.

"(c) *Presentence Investigation.*

"(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

"(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such informa-

Rule 32 is explicit. It asserts that the "report shall not be submitted to the court . . . unless the defendant has pleaded guilty or has been found guilty." This language clearly permits the preparation of a presentence report before guilty plea or conviction,[4] but it is equally clear that the report must not, under any circumstances, be "submitted to the court" before the defendant pleads guilty or is convicted. Submission of the report to the court before that point constitutes error of the clearest kind.

Moreover, the rule must not be taken lightly. Presentence reports are documents which the rule does not make available to the defendant as a matter of right. There are no formal limitations on their contents, and

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tion about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government."

[4] The history of the rule confirms this interpretation. The first Preliminary Draft of the rule would have required the consent of the defendant or his attorney to commence the investigation before the determination of guilt. Advisory Committee on Rules of Criminal Procedure, Fed. Rules Crim. Proc., Preliminary Draft 130, 133 (1943). The Second Preliminary Draft omitted this requirement and imposed no limitation on the time when the report could be made and submitted to the court. Advisory Committee on Rules of Criminal Procedure, Fed. Rules Crim. Proc., Second Preliminary Draft 126–128 (1944). The third and final draft, which was adopted as Rule 32, was evidently a compromise between those who opposed any time limitation, and those who preferred that the entire investigation be conducted after determination of guilt. See 5 Orfield, Criminal Procedure Under the Federal Rules § 32.2 (1967).

they may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged. To permit the *ex parte* introduction of this sort of material to the judge who will pronounce the defendant's guilt or innocence or who will preside over a jury trial would seriously contravene the rule's purpose of preventing possible prejudice from premature submission of the presentence report. No trial judge, therefore, should examine the report while the jury is deliberating since he may be called upon to give further instructions or answer inquiries from the jury, in which event there would be the possibility of prejudice which Rule 32 intended to avoid. Although the judge may have that information at his disposal in order to give a defendant a sentence suited to his particular character and potential for rehabilitation, there is no reason for him to see the document until the occasion to sentence arises, and under the rule he must not do so.

However, on the facts of this case, it does not emerge with sufficient clarity that Rule 32 was violated, and we therefore affirm the judgment below. The trial judge did not state that he read the presentence report before the jury verdict was delivered, nor is there any direct evidence in this record that he did. Only a few minutes had elapsed between the delivery of the jury verdict and his statement that he had the report before him and had read it. But only a very short time was needed to read the well-organized five-page report, which was largely in widely spaced tabular form. It is entirely possible that the practice was followed of handing the report from the probation officer to the court just as the jury's verdict was delivered.

We also take note of the very special circumstances appearing in this case. Even if this record revealed

that the judge had read the presentence report after the jury retired and before the return of the verdict, the judge could not have infected the jury with anything he learned from the report since there was no necessity or occasion for communicating with the jury once it began its deliberations, and the jury delivered its verdict immediately upon emerging from seclusion. Moreover, the judge had no discretion whatever in sentencing since the statute prescribed a 25-year sentence; and the only question before him was whether petitioner should be put on probation. Aside from the information about this particular crime which was developed at trial, the judge had had occasion to study a comprehensive psychiatric report on petitioner in determining his competence to stand trial. Every item of information to which the trial judge adverted in sentencing had been revealed to him in the psychiatric report. Moreover, the psychiatric report was three times as long as the presentence report, which was in every material respect a condensation of the psychiatric report. It must have been apparent at a glance to the trial judge that the presentence report contained no new information, and his decision to refuse probation was amply supported by what he had heard at trial and read in the psychiatric report alone. Since the brief presentence report came to the same conclusion on the basis of far less detailed information than the judge already had at his disposal, there was no occasion to study it.

We are unable to conclude from this record either that the presentence report was submitted to the court before the verdict was delivered, thus violating the letter of the rule, or that the handling of the presentence report raised any possibility of prejudice to petitioner's rights under Rule 32.

For these reasons, the judgment is

Affirmed.